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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SAJU VARGHESE,

Plaintiff,

v.

JP MORGAN CHASE & CO., et al,

Defendants.

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New York, N.Y.

14 Civ. 1718(PGG)

November 13, 2014
11:35 a.m.

Before:

HON. PAUL G. GARDEPHE,

District Judge

APPEARANCES

KARL J. STOECKER
Attorney for Plaintiff

MORGAN LEWIS & BOCKIUS, LLP
Attorneys for Defendants
BY: THOMAS A. LINTHORST
SAMUEL S. SHAULSON

(Case called)

MR. STOECKER: Karl Stoecker, Law Offices of Karl Stoecker, for plaintiff Varghese.

MR. LINTHORST: Tom Linthorst and Sam Shaulson of Morgan Lewis for the defendant.

MR. SHAULSON: Good morning, your Honor.

THE COURT: Good morning.

I understand this to be a FLSA action against J.P. Morgan Chase. The case was originally assigned to Judge McMahon. On or about September 22, Judge McMahon recused herself; and on September 29, the case was reassigned to me.

Judge McMahon conducted an initial conference in this case on June 6. At that time she directed the plaintiff to file a motion for what she referred to as conditional certification by June 10, 2014. I refer to that as a motion for the dissemination of court authorized notice to the putative class, but many judges refer to it as conditional certification.

At that time she also provided for limited discovery on the issue of whether the plaintiff was qualified for overtime compensation under the FLSA, and she set a deadline for fact discovery of October 3, 2014. She also set a schedule for summary judgment briefing, providing a briefing schedule that required moving papers by November 4, opposition papers by

December 5, and replies by December 19.

Plaintiff did not move for dissemination of court authorized notice. Plaintiff instead twice attempted to file an amended complaint, which removed the collective allegations from the original complaint, and those documents are docket numbers 12 and 13.

On June 12, plaintiff moved to transfer to the Eastern District of New York, that is docket number 16, and in a brief that plaintiff filed in support of that motion, which is docket number 17, he stated as follows, "Plaintiff wishes to litigate his individual claims" and "now that this is an individual case that no other individuals will join, plaintiff would prefer to litigate in a more convenient forum." Judge McMahon denied the transfer motion and reaffirmed her original scheduling order.

I understand that defendants served discovery requests on plaintiff and noticed his deposition for September 10, 2014. On August 27, plaintiff requested that defendant enter into a stipulation of dismissal without prejudice. I further understand the defendants refused to consent to that.

Accordingly, plaintiff moved on September 10, 2014, for a voluntary dismissal with prejudice. That is docket number 23.

I further understand that Judge McMahon conducted a hearing on plaintiff's application on September 22, 2014. It is apparent to me that the hearing was quite contentious.

Judge McMahon made it clear that she was concerned that the client's decision to dismiss his claims with prejudice was not knowing and voluntary.

On September 26, Judge McMahon recused herself and, as I indicated, the case was subsequently reassigned to me.

After the case was transferred or reassigned to me, the plaintiff sought to withdraw his motion for voluntary dismissal. That was docket number 37. I granted that request on October 17, 2014, in an order that is docket number 40.

On October 24, 2014, Outten & Golden, which had been co-counsel, moved to withdraw as counsel. I granted that application. Accordingly, Mr. Stoecker is sole counsel for plaintiff at this point.

And, finally, on November 10 I received a letter from defendants in which they contend that the action should proceed as an individual action and that Judge McMahon had ruled as much. Defendants also request that I direct plaintiff to appear for his deposition "without additional delay;" and, finally, defendants ask that they not be required to respond to any discovery from plaintiff until his deposition is taken.

In response to that, I received a letter dated yesterday from Mr. Stoecker, plaintiff's counsel. Mr. Stoecker writes that it is both incorrect and irrelevant for defendants to argue that Judge McMahon ordered that this action proceed on an individual basis, and Mr. Stoecker goes on to say that there

is no justification for limiting or delaying the production of documents from defendants to plaintiff's counsel.

So that is the record, as I understand it.

It seems to me that, at the outset, we have to address the question of whether the case is going to proceed as an individual action or as a collective action. It does seem to me clear that the plaintiff has said in numerous filings that this is an individual action. As I indicated, the plaintiff twice attempted to file amended complaints removing collective allegations. Plaintiff also filed a brief, which is docket number 17, stating that it was an individual action. On June 27, 2014, Judge McMahon had a minute entry entered on the docket stating, "This lawsuit will proceed as an individual action."

It seems both that the plaintiff has said on numerous occasions that it is an individual action and it seems that Judge McMahon ordered that it would proceed as an individual action, so I am not sure what the basis would be for arguing at this stage that the action is anything other than an individual action.

Mr. Stoecker, do you wish to address that?

MR. STOECKER: Yes, your Honor. Thank you.

The decision to proceed as an individual action was based upon the statements and rulings made by Judge McMahon, and Judge McMahon subsequently determined that it was

inappropriate for her to be making rulings in this case. So I don't think it would be --

THE COURT: To the extent you are arguing that her decision to recuse herself on September 26 casts doubt on rulings that she made in June, I reject that suggestion. I don't see any connection.

I acknowledge that the hearing on September 22 was quite heated and it is my belief that, as a result of the heated nature and contentious nature of that proceeding, Judge McMahon decided it was probably best for her to recuse herself. But to the extent that you are contending that this undermines or casts doubt or makes irrelevant orders that she entered earlier in the case, I don't see any basis for doing that. Most specifically, I don't see any basis for an argument that her order on June 27 that the case would proceed as an individual action, I don't see any basis for ignoring that order at this point.

And as I said, separate and apart from what Judge McMahon has said about whether there is an individual action or a collective action, plaintiff has repeatedly said it is an individual action. Plaintiff said that in a brief, docket number 17, in the clearest possible language and then the plaintiff has twice filed or attempted to file, I say attempted to file, because permission was not sought, leave was not sought to file an amended complaint. That's why I am using

the word "attempted to file," because the appropriate permission was not obtained from the court. But, in any event, in these two pleadings that the plaintiff attempted to file, the collective allegations were removed from the complaint.

A case can't proceed with this kind of jockeying around about what's in the case and what's not in the case. So I need to understand from you, Mr. Stoecker, why you believe at this point it would be appropriate for me to ignore what Judge McMahon ordered on June 27 and why I should ignore what the plaintiff has said in prior pleadings and in briefing.

MR. STOECKER: Your Honor, given the constraints that Judge McMahon imposed upon us, it simply wasn't possible to move at that time. Ordinarily you conduct some limited discovery before a motion for notice. She didn't give us that opportunity. She told us to submit the motion two or three business days later and to work over the weekend. So it simply wasn't possible procedurally to do it at that time, and we were deprived of the opportunity to do so. Nor did she even allow to us attempt to conduct any discovery on the issue, and she subsequently removed herself from the case.

Now, we don't know what her motive for removal was because she hasn't stated what it was. Your Honor made some speculations on the record that it may have been because of the contentiousness of the hearing. It may have also been because she thought that because of her personal situation it wasn't

proper for her to be making rulings on the case. And now we are --

THE COURT: We can bat this back and forth as long as you want, but I have already rejected the notion. I have said it twice. Now I am saying it a third time. I don't believe that Judge McMahon's recusal of herself on September 26 tells us anything about something she did in June. I just don't see the connection. I am not seeing the connection at all.

MR. STOECKER: I understand, your Honor.

THE COURT: So I am not sure that there is much point in going back and forth on this. I have explained to you why I don't see the connection. You haven't explained the connection to me, so I am not accepting the argument. Just to say it again, I am not accepting an argument that Judge McMahon's recusal on September 26, 2014, makes irrelevant orders that she issued in the case four months earlier. That is not a reasonable position to take.

MR. STOECKER: The simple fact of the matter, your Honor, is that we were not given -- the rules provide for notice in a case such as this in a procedure that the Second Circuit has articulated and your Honor has often implemented. We were deprived of a fair opportunity to avail ourselves of and to implement the rules contained in the statute. There are people out there, Chase assistant branch managers, whose claims are slowly dying as we speak and they are not getting notice of

this case because we were not given a fair opportunity to give them such notice. All I am asking for now is the opportunity to implement the statute and the procedure that the Second Circuit has endorsed and mandated.

THE COURT: The Second Circuit hasn't mandated that every FLSA case has to be brought as a collective action. They haven't mandated that at all. There are individual claims brought under the FLSA probably every day in this courthouse. Not every FLSA case has to be a collective action. Some are brought in that fashion, some are not.

This was originally contemplated to be a collective action and then plaintiff obviously chose to take a different tack. Are you are telling me you chose to take that tack because Judge McMahon made it impossible for you to proceed, made it impossible for you to litigate the case as a collective action? That's what you seem to be telling me. Is that your position?

MR. STOECKER: That's correct, your Honor.

THE COURT: Let me hear from your adversary at this point.

Who is going to speak on behalf of the defendant?

MR. LINTHORST: Tom Linthorst, your Honor.

THE COURT: Go ahead, Mr. Linthorst.

MR. LINTHORST: Let me just address briefly one point by Mr. Stoecker, then I am happy to address anything else your

Honor may be interested in. But the case was filed as a collective action. At the initial conference, Judge McMahon said, Let's decide the merits of this case, and here is a schedule. Mr. Stoecker asked and said the first order of business, your Honor, is to file a motion for notice, and she said, okay, file your motion for notice, and she gave Mr. Stoecker a deadline to do so. He did not request discovery before the motion. He did not seek anything different. Outten & Golden was co-counsel at the time, a very prominent plaintiffs' employment class action firm who has filed motions for notice in this court dozens if not hundreds of times. If they strategically wanted to proceed as a collective action in this case, they would have done so on the deadline imposed by the court, which was also very restrictive and very tight on the defendants as well.

As Mr. Stoecker's letter of yesterday makes clear, however, this was not just a logistical issue, but a strategic issue, that even if they filed that motion and even if the court granted it, they did not want those claims to be heard by Judge McMahon. And so they made the strategic decision, having first requested the deadline to file the motion, to not file the motion and to have the case proceed as an individual action. We would respectfully submit that they should not be allowed to go back and forth on these decisions based on the identity of the judge because it taints the process.

THE COURT: Let me break in at this point, Mr. Linthorst, and ask Mr. Stoecker a couple of questions.

Mr. Stoecker, at that initial conference where the date was set for the motion for court authorized notice to the putative collective, did you request discovery?

MR. STOECKER: Yes, your Honor.

THE COURT: You did.

MR. STOECKER: The motion was raised toward the conclusion of the conference. Prior to that, the judge had already indicated that discovery was going to be limited to the merits issue of whether the exemption to the overtime applied, and that she wanted to reach the merits as quickly as possible because she thought Rule 11 applied and that the claim shouldn't have been brought.

At that point we decided that --

THE COURT: Did she explain why she thought the claim shouldn't have been brought?

MR. STOECKER: She mentioned that a prior case that my co-counsel had brought called the Pippin case which concerned --

THE COURT: Spell that for the court reporter.

MR. STOECKER: P-I-P-P-I-N.

-- employees of an accounting firm and a different exemption. She thought that that case may govern this case.

THE COURT: So what you are telling me, and I am going

to go back and look at the transcript -- I assume it was on the record.

MR. STOECKER: No, it wasn't. That was one of the problems, your Honor.

With regard to the amended complaint, she gave permission at that conference to file an amended complaint and that didn't appear in the record. So that's why there was confusion thereafter regarding the amended complaint.

THE COURT: So what you are telling me is at the June 6 conference you asked for some period of discovery before your motion for dissemination of court authorized notice would be filed, and you are saying that she rejected that request?

MR. STOECKER: We didn't get to that point, your Honor. She lambasted the claims. She said Rule 11 probably applied and when, toward the end of the conference, we raised the motion, she said, Go ahead and work over the weekend and get it to me on Tuesday, and there was no more -- she would not brook any further discussion of the issue of discovery which she had previously ruled was going to be limited solely to the narrow merits issue of the exemption.

THE COURT: I will go back to you, Mr. Linthorst. I broke into your argument, so go ahead.

MR. LINTHORST: Yeah, well, I will just, if I may, your Honor, revisit the conference on the 6th. I was there. We started off, and Judge McMahon gave Mr. Stoecker the chance

to tell the judge about the case, and he said this is an overtime case by an assistant branch manager.

We got into a discussion of the merits and we got into a discussion of the Second Circuit's case in Donovan v. Burger King in which the Second Circuit found that assistant managers at Burger King were exempt under the executive exemption of the FLSA. So she was familiar with the decision. She had also handled, as I am sure every judge in the court has, many FLSA cases, including the Pippins case.

So there was that discussion of the merits. She indicated that she thought it was appropriate for a prompt resolution of the merits. She didn't prejudge the merits. We just had a very robust discussion of the state of the law within the Second Circuit and under the regulations from the Department of Labor for assistant managers. I don't know that she appreciated at that time that it was brought as collective action. So Mr. Stoecker then, after she said we need to decide these merits, Mr. Stoecker then said, Well, wait a second, judge. This is brought as a collective action, and so first thing that needs to happen is notice needs to go out and I need to file that motion. She said, Fine. File your motion. Here is your date. Chase, here is your date. Go ahead.

And so there was no request for discovery, granted or denied as to that. Those motions are filed all the time without discovery. Outten & Golden files them all the time.

So there was nothing requested that was denied from that, your Honor.

THE COURT: While it certainly is true that in many cases the plaintiff indicates that they don't need discovery before -- actually let me step back.

In many cases, the defendant doesn't even dispute whether a court-authorized notice should be disseminated. The standard for doing that is so low that in many cases the defendants don't even bother opposing the application. Where the defendants oppose, it is true that sometimes the plaintiff takes the position that no discovery is necessary and that we can litigate the issue as to whether notice should be disseminated without the benefit of discovery. And then there are cases in which the plaintiff says that they need discovery.

So let me ask you, Mr. Stoecker, why do you need discovery on the issue of whether notice should be disseminated to whatever the putative class is or the putative collective is in this particular case?

MR. STOECKER: Typically, your Honor, if the motion is contested, there are several plaintiffs who are submitting affidavits, which the mere fact of that in and of itself gives the court an indication that there are indeed individuals who are similarly situated, because you have several people before the court.

Here there is only one plaintiff. So I think it would

be appropriate to buttress such a motion with just limited document discovery or employee handbooks, job descriptions, time records, job postings for the position at issue and things of that nature. So we have an indication that there are other people that are working overtime and not getting paid for it.

THE COURT: Let me ask you about, because reference is made that Judge McMahon wanted to reach the merits of whether the assistant branch managers were exempt or not, and she wanted to reach that early on. Defense counsel made reference to Donovan v. Burger King. There certainly are lots of cases in the FLSA labor law context involving various sorts of assistant managers, and I don't claim to have encyclopedic knowledge over all of them, but I am familiar with a number of them that have arisen in the context of drugstores, particularly the big chains.

The big chain drugstores have titles of assistant store manager. This happens to be assistant branch manager. In the drugstore chains they have assistant store managers. I had some of these cases myself, and I am familiar with other cases that other judges had. There was evidence in those cases that assistant store managers, despite the title, were frequently stocking shelves and doing tasks that were in no way supervisory.

So I don't know there is any magic to the title "assistant manager." I think you have to look at each

industry, each employer, and the duties that people are performing in that role, in this case assistant branch manager, before one can make a determination as to whether they are exempt or not.

In other words, this is all a long way of saying that I am not sure that you can translate or transfer a finding in another industry -- whether it be the fast food industry or some other type of industry, drugstore industry -- and say, okay, these were assistant managers and they were or were not found to be exempt and therefore we are going to take that and apply it here. I am not sure that works.

But let me ask you, Mr. Linthorst, do you believe it would be improper at this point to permit plaintiff's counsel some period of discovery before he is required to make a motion for conditional certification?

MR. LINTHORST: We do, your Honor. We believe it would be inappropriate to permit him that discovery and to permit him to file that motion. This was not a question of logistics or deprived opportunity before. This was a question of a strategic decision, which they fully admit to in the letter that was submitted to the court yesterday, that they did not want the collective action claims heard by Judge McMahon.

They had a second plaintiff, by the way, that they indicated both to defense counsel and the court was going to be added to the case, and they decided not to do that shortly

after that conference as they sought to get everything they could away from Judge McMahon. They asked the court to allow the case to proceed as an individual action. The court granted their request and ordered it to proceed as an individual action, and the doctrine of judicial estoppel precludes them from coming back to the court and here, in the very same case, to say, even though you granted us what we requested, now we want to make a different request and contradict the prior order.

THE COURT: There are a number of difficulties, and I am sure everyone here is aware of the difficulties. The difficulties are that Mr. Stoecker has made certain representations about what was said at the conference on June 6. The conference was not on the record, so I don't know a transcript I can look at of what was said. What he has said to me is that Judge McMahon set an unreasonable schedule for the filing of his motion in support of court-authorized notice. He has indicated that he wanted discovery before filing the motion, but was not able to articulate that. I'm not sure, Mr. Stoecker, what's your position on that? I think you told me you didn't request discovery, but the judge didn't give you an opportunity to do that. What's your position on that? Did you seek it? Were you not given the opportunity to seek it? What's your position?

MR. STOECKER: Your Honor, the question of the

collective action or the notice motion came at the end of the conference, and it was very clear that her Honor was not brooking any further discovery -- any further discussion. She had already ruled that discovery was limited on that issue.

And with regard to Mr. Linthorst's characterization of the discussion about the merits, I hate to get into an unseemly back and forth about what occurred at something where there was no transcript, but the fact of the matter is as soon as Judge McMahon learned that this case concerned an assistant branch manager at Chase Manhattan Bank, she raised Rule 11 without knowing anything else. And then it was Mr. Shaulson who raised the Burger King case. And, as your Honor already indicated, what happens in a hamburger restaurant is very different from what happens in a bank or in a drugstore like Rite Aid.

So, yes, your Honor, we wanted discovery. We asked for discovery. She said, no, there is going to be nothing but getting to the merits and disposing of this case as quickly as possible. So the answer is we did not have the opportunity to get into the issue of discovery prior to the notice motion.

THE COURT: I see some shaking heads back there, so I suspect your adversaries disagree. So spread on the record what your recollection of the conference was.

MR. LINTHORST: Well, ultimately at the end I think Mr. Stoecker concedes that he did not seek discovery in support

of a motion for conditional certification at that conference or at any other time. At no time when they were making representation to this court that they wanted to proceed as an individual action did they say we have no choice but to do so because the court wouldn't afford us discovery or gave us a tight time frame. This was all strategic. It was all intentional based upon the identity of the judge. It was well within Judge McMahon's discretion to order a tight deadline on briefing of the motion that they requested, and the law of the case should prevail here. That order should not be disturbed when it was well within her discretion and the order that the case proceed on an individual basis should not be disturbed, particularly because they requested that order. That is what they requested Judge McMahon to do.

THE COURT: They requested what order?

MR. LINTHORST: They requested to be able to proceed in this case on an individual basis.

MR. STOECKER: Your Honor, if I may, no such request was made. The simple fact of the matter is we just didn't make the motion because we couldn't do so by the deadline and at the succeeding conference the judge merely recited the fact that no motion had been made and the case was now proceeding individually at that point in time.

THE COURT: I take it there is no record of that conference either.

MR. STOECKER: It was a telephonic conference.

THE COURT: Sure, but I have court reporters for telephonic conferences all the time. There is no transcript of that conference either?

MR. LINTHORST: Not that I know of.

MR. STOECKER: I am not aware of one, your Honor.

MR. SHAULSON: May I, your Honor? It is in the record, they requested that this action proceed on an individual basis only. That's what you read before when you laid out the facts.

THE COURT: What I read -- I made reference to two things. I made reference to the fact that plaintiff had repeatedly attempted to file an amended complaint that removed the collective allegations, and I cited plaintiff's brief, docket number 17, quoting language in which the plaintiff said, "Plaintiff wishes to litigate his individual claims," and then the brief went on to say that plaintiff preferred to litigate his individual claims in Brooklyn.

MR. SHAULSON: And I believe from there the judge issued the minute order saying this action will proceed as an individual action. So the plaintiffs got exactly what they asked for. In fact, they got what they asked for as part of a four-month odyssey to remove the judge from the case. They got exactly that result. They got the relief they wanted, removing the judge from the case. And then as soon as the judge removed

herself from the case, as your description of events made clear, they flipped again and said, okay, now we are willing to proceed with this case in this court, despite our previously trying to dismiss it with prejudice. So they got exactly what they wanted, and they can't now change courses yet again, speaking out of both sides of their mouth. This is a classic case of judicial estoppel and a classic case of law of the case.

THE COURT: Why do you say they tried to remove the judge? I don't understand what you are talking about.

MR. SHAULSON: As the hearing transcript makes clear, where Judge McMahon on numerous instances said it is quite clear, this is transparent judge shopping going on.

THE COURT: That was in response to what, their desire to voluntary dismiss? Is that what you are talking about?

MR. SHAULSON: There were many things. First they tried to transfer the case, as you indicated. They tried two attempts to amend the complaint, then to transfer the case, then to settle the case, then to withdraw without prejudice, then to withdraw with prejudice, even as Judge McMahon was concerned about sacrificing the plaintiff's rights and voluntary and knowingly giving up the case.

And then no sooner did Judge McMahon recuse herself, they flipped again and say, okay, now we are fine proceeding in the Southern District of New York, now we are fine proceeding

on behalf of this plaintiff who, incidentally, told the court in the hearing that under no circumstances did he want to proceed with this case. But that was short lived after Judge McMahon recused herself.

So the defendants have been on this odyssey for four months at least of trying to get the judge off the case. They have succeeded based upon the very representations they made to the court that they only wanted to proceed on an individual basis and not a collective action basis.

And now that they have obtained the very result that they sought, they are now asking this court to violate Judge McMahon's order, to overrule that order, to disregard the very representations that they made to the court, and now allow them to do what they have done, now that they have accomplished the very judge shopping that has occurred in this case.

That is improper. It violates the law of the case doctrine. It violates the judicial estoppel doctrine. It just shouldn't be done.

Plaintiff shouldn't be allowed to change courses over and over again for their own strategic purposes. The defendant has rights here, too. We spent tens of thousands of dollars on this odyssey, tens of thousands of dollars trying to prevent what we believe is improper judge shopping, what Judge McMahon found was improper judge shopping, and now they should be held to the representations they made to this court.

MR. STOECKER: Your Honor, we didn't succeed in getting the judge to recuse herself based on any representations about proceeding as an individual action, so that is just absurd. Nor did we ever seek an order from the court that this would proceed as an individual action. We indicated that that was plaintiff's preference, after we declined to make the motion in the brief, and the judge noted that it was proceeding as an individual action. There was no order that was litigated and entered by the court on that particular point. To say that they have spent tens of thousands of dollars when we notified them a long time ago of our then intention to dismiss the case, and they continued to run up costs with discovery, is a little disingenuous. Given the state of affairs --

THE COURT: You don't deny the judge shopping aspect of what you were doing, do you?

MR. STOECKER: No, we don't. No, we don't. We didn't -- the plaintiff didn't think that the judge -- that he was going to get a fair shot before the judge and that the judge was behaving appropriately. But it was lead counsel Outten & Golden that made the decisions as to how to address those facts, and it is not fair to saddle plaintiff with responsibility for everything that happened and to penalize all of the other assistant branch managers that are out there whose claims are dying.

THE COURT: But let's bring some reality to the situation. If there are other assistant branch managers out there who believe they have claims, they are free to bring them. Their claims haven't been extinguished by anything that's happened here. They all have the right and they have had the right for some time to bring any actions that they deem appropriate. I gather they have chosen not to do so. But there hasn't been any negative effect on any of their claims. For all we know they have chosen not to bring those claims because actually they don't think that they have suffered any injury under the law. You are asking me to assume that there are lots of assistant branch managers out there who have valid claims for compensation under the FLSA. I don't know that. From my perspective it is just as possible that actually none of the assistant branch managers at J.P. Morgan Chase have any valid claims under the FLSA. I don't know which is true, and I can't assume that they have valid claims at this stage.

MR. STOECKER: I understand, your Honor. That's what we are here to decide. That's why we are litigating the case, and that's ultimately what a jury may decide.

THE COURT: You can understand, sir, why I am troubled by -- it is a troubling situation. You have repeatedly taken the position you want the case to proceed as an individual action. You say to me, yes, we did that, but the reason why we did it is the judge set an unreasonable schedule. I will have

to consider that.

I will tell that you my consideration of the argument is made significantly more difficult because there is no record of the conversations -- well, there is no record of what happened at these conferences other than minute orders that are, you know, ten lines long and, frankly, don't convey much about what either side has said went on. In fact, they don't convey anything along the lines of what counsel has said went on at the June 6 and June 27 conference. So it makes my task very difficult because I don't have a record.

MR. STOECKER: Your Honor, I think the important thing to keep in mind is that we are not talking about substantive rulings and orders on substantive issues. We are talking about procedural issues that every judge has discretion with regard to.

With respect to the timing of motions and the schedule at the conclusion of the September 22 hearing, the judge said the case is on suspense and all the current schedules are basically out the window. So given that the facts have changed and we now have to decide upon new schedules and we are not bound by any orders regarding a date, there is no magic in any particular date. The dates are based upon the facts as they existed at the time. So we can go ahead and your Honor has the discretion to schedule things any way he wants, because there were no orders that are at issue that were actually litigated

and decided by Judge McMahon.

THE COURT: I agree I have the discretion to set dates, but that's not what we are talking about. What we are talking about is whether the case is going to proceed as a collective action or as an individual action. That's what we are talking about.

MR. STOECKER: What we are talking about is a procedural step of giving notice to people who are affected by this, because the reality is most people don't know that they have overtime claims, and all we are giving them is notice to come in and say, hey, you may have a claim. You were invited to join this case, and we can litigate the case.

MR. SHAULSON: Judge, I don't think that's all we are talking about here. We are talking about our system of justice. If our system of justice allows parties to spend four months trying to engage in what is improper, judge shopping is improper, if you spend four months trying to engage in improper judge shopping and then you ultimately succeed in your effort to shop away from a particular judge and then you don't have to abide by the court's prior orders, it really sets a very bad precedent for our system of justice. That's what we are talking about here, and we are talking about very well-established legal doctrines to prevent this from happening.

The law of the case, the law of the case, you can't

avoid a court order, particularly in this circumstance, where the reason you are trying to avoid it is admitted judge shopping; and, secondly, the judicial estoppel doctrine, very well-settled doctrine, doesn't allow a party to speak out of both sides of their mouth to get a result based upon representations to the court one way and then when they get that result, now they completely switch gears and say we want the opposite result.

THE COURT: Because what was said at these conferences is so central to this issue, I am going to require affidavits. I am going to require affidavits as to what was said in particular as to the discussion about the schedule for any motion requesting court-authorized notice, any discussion of discovery, any discussion about the merits of the case, and what effect that had on the schedule that was set. I am going to require affidavits from both sides addressing that. I'm not going to proceed on the basis of letters. I don't think it is appropriate.

As I said, I wish I had a transcript. I don't. So I am going to require the parties to submit affidavits as to what they recall was said at these conferences that we have been discussing.

MR. STOECKER: Your Honor, if I may, I think that places the attorneys in the position of being witnesses in their own cases.

THE COURT: That doesn't go to the merits. It doesn't present any obstacle. First of all, even where attorneys are fact witnesses, that doesn't necessarily require disqualification. What we are talking about here has nothing to do with the merits of the case. It has to do with the procedure under which this case is going to proceed.

And, frankly, the allegations both sides have made are deeply troubling to me. On plaintiff's side, plaintiff has argued that the judge had prejudged the merits of the case and set a schedule that was unreasonable and that the schedule that the judge set was so unreasonable that the plaintiff was required to take desperate measures to try to get out of the case. That is the plaintiff's side of it.

On the defense side, the argument is that none of that is true, and in fact what happened is that the plaintiff perceived that he might do better in front of a different judge, and then he took a number of steps designed to judge shop to get to another judge that might give him a better chance of recovery, and those allegations of judge shopping are equally troubling.

So given that these serious allegations have been made by both sides and given that I don't have a transcript of what was said at the critical conferences before Judge McMahon, I am requiring the parties to submit affidavits as to what was said in these conferences, and I will consider them in deciding how

this case should proceed and, in particular, whether it will proceed as a collective action or as an individual action, as plaintiff repeatedly requested before Judge McMahon.

To state the obvious, it is extremely troubling that a party would repeatedly request that a case proceed as an individual action and then when the case is reassigned, completely reverse their position. That is deeply troubling. If the argument is that that behavior was appropriate because of actions the judge has taken, then I need reliable evidence upon which to make that determination and I don't have that at this point.

Go ahead, Mr. Stoecker.

MR. STOECKER: Your Honor, with respect to the key points, I believe they are already in the record. The discovery schedule that was set was in the record and, by the way, she gave the defendants more time to respond to the motion than she gave the plaintiffs to make the motion, in both instances on which we distinguished there were motions. The comment of Judge McMahon regarding rule 11 was confirmed by the judge herself at the September 22 hearing. The judge indicated that she makes the Rule 11 comment in every case. So there was no dispute and there is no dispute today among anybody that such a comment was made.

To argue in affidavits over the timing of the comment and how much discussion took place before or after at a

conference that occurred on June 6, I respectfully submit, is not going to be productive in my view.

THE COURT: It is up to you Mr. Stoecker. If you don't want to submit an affidavit, you don't have to. I will consider an affidavit from defendants. I just went through a trial where people testified for days about what was said seven years ago. So your argument that you can't submit an affidavit about what was said four months ago doesn't have a lot of resonance with me.

MR. STOECKER: How are we going to resolve the credibility -- who is going to make a credibility determination?

THE COURT: That's why I am here, sir. I will make the decision. And, again, I am not ordering you to submit an affidavit. If you don't want to, you don't have to. I am telling you that I don't have a record here, don't have a transcript. I am not going to rely on letters from lawyers about what was said. That's not good enough. So it is up to you. If you don't want to submit an affidavit, you don't have to. But if your adversary submits an affidavit, I am going to consider it. It is up to you. These are serious allegations on both sides, and I need an appropriate record upon which to decide these issues. I don't have one at this point.

MR. STOECKER: Your Honor, the allegations regarding Judge McMahon and the procedure that then lead counsel chose to

follow is not really at issue in this case.

THE COURT: There is an allegation that she was biased against these claims, that she had made up her mind, and that's why you are arguing that the conduct here was necessary. She had prejudged the issues. She is biased against you. Those are serious allegations. And I will tell you that absent those types of allegations, I wouldn't for a minute consider whether this could proceed as a collective action on this record where the plaintiff has repeatedly requested that the case proceed as an individual action; absent significant, compelling circumstances that would justify 180 degree difference in position? We wouldn't even be having a conversation about this. The only reason why we are having a conversation about whether this case should be permitted to proceed as a collective action is because you have made very serious allegations about how Judge McMahon initially approached this case. Absent those kinds of allegations, the record is such that I could not in good conscious permit this case to proceed as a collective action. A party cannot say repeatedly I want the case to proceed as an individual action, the case is then transferred to another judge and then say, oh, I changed my mind. Now I want it to proceed as a collective action. No, I would never permit that.

So, just so there is no confusion here, the only reason why I am even considering whether this case should

proceed as a collective action is because of very serious allegations that you have made about what happened in these off-the-record conversations before Judge McMahon at these conferences where you allege that she had essentially prejudged the issues. That is the premise for your argument that you should be now permitted to proceed as a collective action. Without that, you have no argument.

MR. STOECKER: I understand, your Honor. But now we are putting ourselves into a position where, as I understand it, your Honor's ruling is going to turn upon whether in fact Judge McMahon had prejudged the issues, and that's going to open a whole arena of satellite litigation on Judge McMahon's personal situation, her husband's investments, his relationship to Chase Bank, and so on and so forth. As a sole practitioner, I simply don't have the resources to get into all of that.

THE COURT: As I told you, I am not requiring you to submit an affidavit. You will do what you deem best for your client, and you will either make the submission I have requested or you won't.

I have explained to you why I believe the record is inadequate. It seems obvious to me. There is no transcript. So that's not hard to understand. There is no transcript of what took place at these conferences. Serious allegations have been made about what transpired. I have told you I am not willing to rely on letters for that purpose. You have

indicated some unwillingness to file an affidavit. I have told you that's up to you. More than that, I can't say.

MR. STOECKER: I understand, your Honor.

THE COURT: Given that this is a threshold issue, whether the case is going to proceed as a collective action or an individual action, I don't think we can make any progress or set any schedules until we know the nature of this case. We don't know that yet. We don't know whether it is going to proceed as an individual action or a collective action.

So Mr. Linthorst, what's your position on whether you will submit an affidavit or somebody from your firm?

MR. LINTHORST: No objection, your Honor. We intend to do so.

THE COURT: How long will you need to do that?

MR. LINTHORST: Two weeks, your Honor?

THE COURT: All right. So today is the 13th.

MR. STOECKER: Your Honor, if I may, I am sorry to interrupt. If my burden now is to show that the judge -- that Judge McMahon was -- acted inappropriately and prejudged the case, plaintiff will respectfully decline to proceed collectively and will litigate his individual claim. I can't saddle this plaintiff with that kind of satellite litigation and now wait two weeks for them to just put in an affidavit and then have this issue resolved. So we will proceed individually, your Honor, if that is the landscape that we are

faced with at this point.

THE COURT: I have said it now several times. I can't resolve the issues that the parties have presented to me on the basis of letters. I told you why. I have no transcript of what took place. I am not willing to rely on letters. The allegations are too serious. So I need affidavits. I have told you why. I haven't made any decisions about how I would rule on the issue. I don't know whether I would permit the case to proceed on a collective action theory or simply on an individual basis. But I will tell you that I believe I need the record supplemented in the fashion I have indicated before I could rule on that subject.

If you are telling me that, in light of what I have said, you wish to proceed as an individual in the form of an individual action, then that is what we will do. But I want to make it crystal clear to you I have in no way made a determination of whether the case should proceed as an individual action or as a collective action. What I have identified for you is what I believe are very serious allegations that both sides made and that need to be supported, given the absence of a transcript, by affidavits. That's all I have said.

Understanding that, do you wish to proceed in the form of an individual action?

MR. STOECKER: Your Honor --

THE COURT: Do you want to think about it?

MR. STOECKER: Yeah, I should probably think about it, because essentially we now have to prove or establish that the standard for recusal of Judge McMahon was met, notwithstanding the fact that she has already recused herself and we don't know why. So now we are really going backwards and we have to prove something that the judge has already perhaps implicitly acknowledged by recusing herself.

THE COURT: I haven't set any standard for what you have to prove. What I have told you is that these are serious allegations and I need a broader record than I have now. I haven't told you that you have to show me X if you want me to rule Y. I haven't said that.

What I am trying to communicate to you, and I want to be very clear about this, is that the record is inadequate. There are no transcripts. The parties make conflicting claims about what was said. They have sent me letters that dispute what was said. I am not going to decide the issues based on the letters that have been submitted. I need a more reliable record than that. It is entirely up to you whether you want to participate in that process. If you don't want to submit an affidavit, you don't have to. Defense counsel has indicated they will submit an affidavit. If you don't submit an affidavit, I will rule on the issue based on the record I have in front of me. But more than that, I can't really say. If

you want more time to think about how want to proceed, I can give you that, but that's where we are at.

MR. STOECKER: Thank you, your Honor. If I may, I would appreciate a couple of days to think about that. But in the meantime, let's assume that we don't go that route and we proceed individually, can we now discuss and set a schedule for further proceedings in that regard?

THE COURT: Ordinarily what I would do in a case like this is provide for 90 days of fact discovery. Is there some reason why that would be inadequate here?

MR. STOECKER: No, your Honor.

THE COURT: Or inappropriate?

MR. STOECKER: No.

THE COURT: Then I would see you at the end of 90 days, ask you whether there is going to be a dispositive motion; if so, set a schedule; if not, put the case down for trial.

So today is the 13th. Mr. Stoecker, can you tell me by November 18 how you want to proceed?

MR. STOECKER: Yes, your Honor.

THE COURT: So you will send me a letter on November 18 telling me how you want to proceed. If you want to proceed in the form of an individual action, then I will enter a case management plan that provides for, unless defense counsel objects, 90 days of fact discovery, conference at the end of

that period at which dispositive motions will be discussed.

Anything you want to say, Mr. Linthorst?

MR. LINTHORST: Yes, I just want to say if it does proceed as an individual action or either way, we would respectfully request that the plaintiff appear for deposition on a mutually agreeable date within two weeks of the date that the nature of the case is resolved and before should plaintiff presumably serve discovery, which he has not done to date, before we have to respond to such discovery.

THE COURT: I do think that it would be appropriate for plaintiff's deposition to be taken in fairly short order, Mr. Stoecker. The request to take the plaintiff's deposition has been pending for some time, hasn't it?

MR. STOECKER: Your Honor, that was in the context of the schedule which was put on suspense by Judge McMahon, and that request to take the deposition I believe was initiated even after we told the defendants that plaintiff was moving to voluntary dismiss the case.

MR. LINTHORST: That's not true, your Honor.

MR. STOECKER: In any event, we don't have any documents from the defendant, so to take the deposition in a vacuum would be sort of a wasteful exercise. I assume they intend to show the plaintiff documents at the deposition, so why should plaintiff be in the position of doing a deposition by ambush where neither he nor his attorney knows what is going

on with respect to documents?

THE COURT: Have you served any discovery requests?

MR. STOECKER: No. We tried to minimize costs after the decision was made to seek voluntary dismissal. So I can serve discovery requests within a week, and if it is just one plaintiff, I don't imagine that the documents we are talking about are that voluminous. And I am sure the defendants have the documents standing by as this case, as I have indicated, this case has been going on for some time and they are very thorough lawyers.

THE COURT: What's your position.

MR. LINTHORST: Your Honor, they didn't serve discovery because they were engaged in an effort to get the case away from Judge McMahon. We served our discovery well before plaintiff first approached and indicated an intent to dismiss. He was noticed for deposition on September 10. They very belatedly, on that same day, sought a stay of discovery, which was denied. They refused to schedule his deposition. They shouldn't be allowed to engage in a unilateral continued stay of his deposition so that they can now try to seek discovery that they had a full opportunity to take throughout the summer.

THE COURT: I am not going to delay the taking of the plaintiff's deposition. Mr. Stoecker, you are welcome to submit any discovery requests that you wish, but I am not going

to require that the plaintiff's deposition be taken after there has been a document production from the defendants.

MR. STOECKER: Your Honor, to proceed with a deposition without documents, it is fundamentally unfair for them to use documents at a deposition that they haven't previously produced to us.

THE COURT: But parties have the right to request documents. You could have issued a document request. They have been trying to take this man's deposition for months. The way the discovery system works is both sides have the opportunity to exchange document requests. That could have been done a long time ago.

MR. STOECKER: That's correct, your Honor, but this is, to put it lightly, a very unique procedural posture in the case.

THE COURT: What do you say to your adversary's claim that they had noticed this man's deposition for September 10 and you told them on September 10, no, I'm not going to produce him?

MR. STOECKER: I didn't tell them that. Plaintiff's former counsel may have said something.

THE COURT: Co-counsel, right? It was co-counsel, right?

MR. STOECKER: Lead counsel.

THE COURT: Lead counsel. So lead counsel then, which

has essentially withdrawn from the case, told defense counsel on the date the deposition had been noticed for, no, we are not going to produce him.

MR. STOECKER: Depositions are rescheduled all of the time by mutual agreement.

THE COURT: But this wasn't mutual. They wanted to take his deposition. They had noticed his deposition. And plaintiff's counsel didn't tell defense counsel, No, we are not going to produce him until the day that the deposition was supposed to take place. Plaintiff's counsel then sought a stay of discovery. I gather that Judge McMahon denied that. So the context here is the defendants have been trying to take the plaintiff's deposition for the past two months, haven't been able to do that. Your argument now is, Judge, it would be unfair to have plaintiff's deposition taken when I have no documents. The problem with that is you never sought documents. You can't delay the deposition indefinitely because you have never requested documents. That's not fair.

MR. STOECKER: We sought to conserve costs.

THE COURT: I understand that, sir. And that may have been rational. But what I am saying to you is you can't delay the deposition of your client indefinitely by not requesting documents. You can't do that.

MR. STOECKER: Your Honor, if I may, if they could then just give me a week prior to the deposition any documents

they intend to use at the deposition I don't think that's too much to ask for, so we can do this in an orderly, rational fashion, rather than have a deposition in a vacuum and by ambush.

THE COURT: I agree that that may be rational, but I don't think it is required. What will happen instead, if the plaintiff has not been made familiar with these documents ahead of time is presumably long delays will have to be taken at the deposition while the plaintiff reviews the documents. This isn't rocket science. So, sir, if your concern is your client is not going to be familiar with a document, then all your client has to say is, I am going to need some time to read the document, and time will be taken for that purpose. Do I think that is a rational way to proceed? No. But what I am not going to do is allow you to delay your client's deposition because you never requested documents. That I am not going to permit.

MR. STOECKER: Okay, your Honor.

THE COURT: So if I enter a case management plan, whenever that plan is issued, plaintiff's deposition is to take place within two weeks of that date.

So just to review where we are, you are going to tell me by November 18, Mr. Stoecker, whether you want to proceed as an individual action or as a collective action. If your answer is that you want to proceed as an individual action, then I

will enter a case management plan providing for 90 days of discovery and the order will also provide that plaintiff's deposition is to be taken within a two-week period.

In the event that Mr. Stoecker tells me on November 18 he wants to proceed in the form of a collective action, then I will give the parties time to submit affidavits that I have referenced, I guess a week to put in affidavits, if they choose, about the issues that we have talked about today.

Once I have the parties' submissions, I will rule on the issue of whether it is appropriate for the case to proceed as a collective action.

Anything else anyone wants to say?

MR. SHAULSON: Your Honor, could we just have one moment.

(Counsel confer)

MR. LINTHORST: Your Honor, we see no reason to delay the plaintiff's deposition for the outcome of plaintiff's intention as to proceed collectively or individual. His deposition is going to have to be taken either way.

MR. SHAULSON: I think, your Honor, that was what Mr. Soecker was asking. He was asking whether it's going to proceed individually in any event, so we shouldn't delay things while Mr. Stoecker decides.

THE COURT: I'm not going to require the plaintiff's deposition be taken before I have entered a case management

plan.

Anything else?

MR. LINTHORST: No, your Honor.

MR. STOECKER: No, your Honor.

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